No. 10995

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONTRACTORS, PACIFIC NAVAL AIR BASES, an Association, and LIBERTY MUTUAL INSURANCE COMPANY, a Corporation,

Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner of the United States Employees' Compensation Commission for the Fourteenth District and JOHN B. PIATT,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEES

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SEATTLE 4, WASHINGTON

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STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Western District of Washington, Northern Division, Honorable John C. Bowen, District Judge, dismissing the petition of Contractors, PNAB, to set aside the award of compensation filed on November 29, 1943, by Deputy Commissioner William A. Marshall, one of the appellees herein, in favor of John B. Piatt on account of disability resulting from injuries sustained on December 1, 1942, while employed in the Territory of Hawaii

by appellant Contractors, PNAB, hereinafter referred to as the employer. The other appellant, Liberty Mutual Insurance Company, hereinafter referred to as the carrier, was the insurance carrier of the compensation liability of the employer. The compensation award was made pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424 (33 U.S.C. 901, *et seq.*) as made applicable to persons employed at certain defense base areas and other places by the Act of August 16, 1941, 55 Stat. 622 (42 U.S.C. 1651-1654).

On December 1, 1942, Piatt was seated at his desk when an electric light reflector shade fell from the ceiling and struck him on the head. Piatt was assisted to the first aid station where those who were caring for him had him lie down and placed an ice-pack on his back and head. He was told to go home and lie down for 24 hours, which he did. On December 3, 1942, he was picked up in an automobile and taken to his office for an important conference but could not continue with the meeting because of his condition. The same day the doctor ordered him to the hospital where he remained until December 24, 1942, when he was brought home in an ambulance. From January 12, 1943, to February 26, 1943, he performed light duties at the office in an advisory

capacity for a few hours a day. He was very tired, had severe headaches, and felt dizzy. Finally on February 26, 1943, while getting ready to go to work, Piatt collapsed in the bathroom of his home and was again taken to the hospital. His condition was diagnosed as cerebral thrombosis, which had paralyzed his left side.

Piatt filed claim for compensation. The employer and the carrier denied the claim upon the sole ground that the cerebral thrombosis was not related to the injury of December 1, 1942. Hearings were held before the deputy commissioner on June 2, 1943 and June 30, 1943. Both sides offered evidence with respect to the issue controverted. Upon the evidence thus adduced before him the deputy commissioner on November 29, 1943 filed the compensation order complained of (R. 9), whereby he found that Piatt was disabled as the result of the injury of December 1, 1942.

The employer and carrier thereupon instituted a proceeding to review the compensation order pursuant to the provisions of section 21 (b) of the Longshoremen's Act (33 U.S.C. 921 (b)). They alleged, in substance, that the compensation order is not in accordance with law because there was no evidence

that the cerebral thrombosis which became manifest on February 26, 1943, was caused by the injury of December 1, 1942. A motion to dismiss the complaint was filed on behalf of the deputy commissioner. The cause came on for a hearing before the District Judge, who by an order entered on October 20, 1944, granted the motion and dismissed the complaint. The employer and its carrier appeal.

ARGUMENT

I

THE FINDING OF THE DEPUTY COMMISSIONER THAT CLAIMANT WAS DISABLED AS THE RESULT OF HIS INJURY IS SUPPORTED BY EVIDENCE, AND BEING THUS SUPPORTED IS FINAL AND CONCLUSIVE.

A. The Principles of Law Support the Deputy Commissioner's Action

The crux of the appellants' case is (1) that the deputy commissioner did not accept certain medical testimony favorable to appellants in making his findings of fact, and (2) that the *medical testimony* does not support his finding that disability resulted from the injury.

The only conclusion to be drawn from the appellants' contentions is that the deputy commissioner of necessity had to rest his decision on no other basis

than the particular part of the medical testimony which they cite, notwithstanding all of the other direct and circumstantial evidence before him in the case. No rule of law requires the deputy commissioner to base his decision upon the testimony or a part thereof, of any particular witness, whether he be a medical or a lay witness. On the contrary, it is well known that the decision of the deputy commissioner must rest upon the whole body of the evidence, with due appraisal of the probative value of each part of it, as well as upon the proper inferences which are to be drawn from the evidence, giving to circumstantial evidence its due weight.[1]

The action of the deputy commissioner in the present case is supported by (1) the direct and cir-

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[1] It is solely within the province of the deputy commissioner or compensation administrator to determine the credibility of witnesses, and he may accept and believe all or any part of the testimony according to his own sound judgment of its truthfulness and reliability. *Wilson & Co., Inc. v. Locke, deputy commissioner*, 50 F. (2d) 81 (C.C.A. 2, 1931); *Rakowski's case*, 173 N.E. 521, 273 Mass. 363 (1930); *Benjamin v. Rosenberg Bros.*, 167 N.Y.S. 650 (1917), aff'd. 223 N.Y. 569. In considering the evidence the deputy commissioner may give weight to "the common-sense of the situation". *Avignone Freres, Inc. v. Cardillo, deputy commissioner*, 117 F. (2d) 385 (App. D.C., 1940).

cumstantial evidence in the case; (2) the presumption which arises from the following facts, all of which were consistent with the kind of injury which he sustained: (a) the apparent good health of the employee, (b) the sustaining of an injury, (c) the consequent chain of symptoms, illness, headaches, and disability, including his final collapse; and (3) the general presumption in the Longshoremen's Act. These will be discussed in the order given.

(1) The direct and circumstantial evidence, in direct proof of his claim, and as supporting the inference and ultimate conclusion that the disability from paralysis resulted from the cause alleged, is so strong as to leave it hardly likely that a reasonable person would conclude otherwise than did the deputy commissioner.[2] Not only was this conclusion reached by the deputy commissioner, but it is also that of the

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[2] The findings of fact of the deputy commissioner supported by evidence should be regarded as final and conclusive and not subject to judicial review. *Marshall, deputy commissioner v. Pletz*, 317 U.S. 383 (1943); *South Chicago Coal & Dock Co. v. Bassett, deputy commissioner*, 309 U.S. 251 (1940); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America*, 288 U.S. 162 (1933); *Jules C. L'Hote v. Crowell, deputy commissioner*, 286 U.S. 528 (1932); *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U.S. 244

District Judge who independently read the record, for he said (R. 127):

> "In fact, I do not see how one reading this record could come to any conclusion as to the cause of Mr. Piatt's disability other than the one the deputy commissioner came to."

This appraisal of all of the evidence, circumstantial and direct, by the court below and its conclusion thereon, is the fair one and that which appeals strongest to the reason. It is the "common sense of the situation" (*Avignone Freres, Inc. v. Cardillo*, 117 F. (2d) 385; App. D.C. 1940). Here we have the case of an employee in apparent good health prior to the injury, working at a war job which required good health and great vigor. He was struck a blow upon the head, which was diagnosed as concussion of the brain, and from that point on there is a record of a constant and continual succession of illness and symtoms until the day of his final collapse. No inter-

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(1941); See 71. C. J. 1297, Sec. 1268. The findings of fact of the deputy commissioner are presumed to be correct. *Anderson v. Hoage, deputy commissioner*, 70 F. (2d) 773 (App. D.C. 1934); *Luckenbach Steamship Co. v. Norton, deputy commissioner*, 96 F. (2d) 764 (C.C.A. 3, 1938); *Burley Welding Works, Inc. v. Lawson, deputy commissioner*, 141 F. (2d) 964 (C.C.A. 5, 1944).

vening accident was shown. None is alleged. If a fair appraisal is to be made of all of the evidence, these facts and circumstances, here briefly stated but appearing in full in the record, must be weighed as part of the totality of the evidence.

(2) But aside from this direct and circumstantial evidence, there is a presumption arising from the facts themselves which further supports the action of the deputy commissioner. This is the presumption followed in *Wroten v. Woodley Petroleum Co.*, 12 La. App. 348, 124, So. 542 (1929), which holds, in substance, that where a workman in apparent good health sustains injury producing immediate symptoms and disability and these symptoms and disability continue thereafter, there arises a presumption that the subsequent disability, if consistent with the kind of injury sustained, did in fact result from the injury. In the present case the ultimate result was consistent with the kind of injury sustained.[3] It was definitely not consistent with some other kind of injury. This presumption is very similar to the general "presump-

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[3] Logical deductions and inferences which may be and are drawn by the deputy commissioner from the evidence are the equivalent of established facts and are not judicially reviewable: *Liberty Mutual Insurance Co. v. Gray, deputy commissioner*, 137 F. (2d) 926 (C.C.A. 9, 1943); *Michigan Transit Cor-*

tion of continuity" of the existence of a given state of facts, or a condition, which the courts frequently rely upon.

(3) There is, finally, the general presumption in the Longshoremen's Act (33 U.S.C. 920) that the claim comes within the provisions of the Act.[4] Here, the testimony of the claimant, Piatt, with that of his wife and of the other witnesses constituting a narra-

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poration v. Brown, deputy commissioner, 56 F. (2d) 200 (D.C. Mich., 1929); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Eastern Steamship Lines, Inc. v. Monahan, deputy commissioner*, 21 F. Supp. 535 (D.C. Me., 1937); *Grain Handling Co., Inc. v. McManigal, deputy commissioner*, 23 F. Supp. 748 (W.D.N.Y., 1938); *Simmons v. Marshall, deputy commissioner*, 94 F. (2d) 850 (C.C.A. 9, 1938); *Lowe, deputy commissioner v. Central R.R. Co.*, 113 F. (2d) 413 (C.C.A. 3, 1940); *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U. S. 244 (1941); *Contractors, PNAB. v. Pillsbury, deputy commissioner*, F. (2d) (C.C.A. 9, No. 10,950, June 22, 1945).

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[4] The Longshoremen's Act should be liberally construed in favor of the injured employee or his dependent family. *Baltimore & Philadelphia Steamboat Co. v. Norton, deputy commissioner*, 284 U.S. 408 (1932); *Fidelity & Casualty Co. v. Burris*, 59 F. (2d) 1042 (App. D.C. 1932); *Associated General Contractors v. Cardillo, deputy commissioner*, 106 F. (2d) 327 (App. D.C., 1939); *DeWald v. Baltimore & Ohio R.R. Co.*, 71 F. (2d) 810 (C.C.A. 4, 1934), cert. den. 293 U.S. 581.

tion of all the facts and circumstances, together with the permissible inferences which the evidence supports, of itself established a *prima facie* case for the claimant.[5]

A *prima facie* case having been thus established, the burden of proof shifted to the employer. This burden, as spelled out under the Act, was to establish, if it could, by "substantial evidence to the contrary" (33 U.S.C. 920), that the claim did not come within the provisions of the Act.[6] What was this "substantial" evidence to the contrary which respondents submitted? It certainly was not any evidence relating to the fact and circumstances of the injury, or to the fact of subsequent disabilitity and illness as

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[5] Notwithstanding sharp conflict in the evidence on question of disability, the injured employee's testimony alone is sufficient to sustain an award in his favor. *Independent Pier Co. v. Norton, deputy commissioner*, 54 F. (2d) 734 (C.C.A. 3, 1931).

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[6] The burden is on the plaintiff to show that there was no evidence before the deputy commissioner to support the compensation order complained of in the bill. *Grant v. Marshall, deputy commissioner*, 56 F. (2d) 654 (W.D. Wash. 1931); *United Employees Casualty Co. v. Summerous*, 151 S. W. (2d) 247 (Tex. 1941); *Nelson v. Marshall, deputy commissioner*, 56 F. (2d) 654 (W. D. Wash. 1931); *Gulf Oil Corporation v. McManigal, deputy commissioner*, 49 F. Supp. 75 (N.D. W. Va. 1943).

related by the claimant and the other witnesses, because that part of the case was not disputed. The only evidence to the contrary which the employer has to rely upon is that part of the medical testimony consisting of medical opinion. Considering the nature of the injury and the disability suffered by the claimant, unequivocal proof that all of his disability was not caused by the injury could not be of a demonstrable nature.

This is clear from the medical opinion itself. This factor has a definite bearing upon the "substantial" quality of the employer's "evidence to the contrary". It is not possible for the physicians to see the pathological condition, while this patient is alive. Moreover, if physicians could see the pathology they would still have to theorize upon the cause, — and theories of causation in medical science are not notable for their infallibility. The medical opinion must of necessity rest in a large measure on hypotheses, and as hypotheses in medicine go they are frequently subject to vagaries because of the very uncertainties in the science itself.

In the present case there of necessity had to be two hypotheses: (1) as to the *direct* cause of the paralysis, and (2) as to the *indirect* cause which operated to make the paralysis possible. The causes of

the end result (paralysis) being beyond observation, a physician in the present case would be safe in his hypotheses, either way, in respect to the mediate and immediate causes of the paralysis. But such hypotheses of the physicians need not rest upon that belief-to-moral-certainty which the deputy commissioner must have before he can decide a case, either way. Therefore, in appraising the value of evidence, medical opinion on so illusive a subject should not *necessarily* outweigh the cogency of the contemporary facts and the appeal to reason of those facts, nor operate to deprive the claimant of the right to the benefit of any doubt, — a right to which he is entitled under the decisions requiring liberality in the application of workmen's compensation law. To hold otherwise would place claimants in the ultimate power of medical witness, as to the disposition of their claims, as the deputy commissioner could not do otherwise than find according to the medical opinion. Thus the physician would be the ultimate arbiter of the facts.

As the direct and circumstantial evidence in the case is sufficient to cause a reasonable person to conclude (as did both the deputy commissioner and the court below) that the final disability resulted from the original cause, and this in turn is reinforced by the presumption of law in the Longshoremen's Act,

and by the presumption arising from the facts (as stated in the *Wroten* case), the "substantial-evidence-to-the-contrary" burden of the employer required the production of evidence of greater probative value to give it the quality "substantial". It may be noted that the medical opinion was not expressed so as to deny the fact of causal relationship on the ground that the ultimate condition of the claimant (paralysis) *could not have* resulted from the injury. In other words, the medical opinion was not to the effect that the subsequent disability is *not* of a nature consistent with that which might be expected to result from such a concussion or head injury. If it had been, the medical opinion would have had more substance or worth. And as affecting the value of such medical opinion as there was, it is here emphasized that such opinion was based in part on a misapprehension of the facts. Dr. Cloward testified that medical practitioners could not say positively one way or the other that the injury to the claimant's head caused his paralysis (R. 110, 115). This is certainly not "substantial evidence to the contrary", but shows the tenuousness of the medical hypotheses. Furthermore, the physician disclaimed *knowledge* one way or the other of causal relationship when he testified "*I don't know whether a person could say that plugging up* [which

caused paralysis] *was due to the blow he got on the head three months ago or not.*" (R. 115). If he does not know, *he can not deny the fact.*

This is not a case where there had been an injury with absence of any related train of symptoms, and then some time later the occurrence of pathology, the relationship of which to the injury is not apparent, or which has every appearance of remoteness where the only evidence upon which to go forward may be medical opinion. But because such evidence may be vital in such a case does not mean that medical opinion evidence as such, is necessary to support an award or is controlling where, as in the case at bar, there is other evidence to establish the nexus between injury, illness, and eventual disability.

A considerable portion of Appellants' brief is spent in attempting to show that the findings must be supported by "substantial" evidence and that in the present case no finding in respect to causal relationship can be so supported unless it be by expert medical testimony, because the subject is "highly complicated". The Supreme Court has too often considered the rule applicable to findings of fact under the *Longshoremen's Act* to leave the rule in any doubt. None of the Court's decisions specify that such findings shall be supported by "substantial evidence";

many enunciate the necessity that findings of fact must be "supported by evidence", and rule that if they be, they are final. *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940); *Davis v. Dept. of Labor*, 317 U.S. 249, 256 (1943); *Norton v. Warner*, 321 U.S. 565, 568 (1944); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Voehl v. Indemnity Ins. Co.*, 288 U.S. 162 (1933).

Here at issue is the weight of medical opinion testimony. The *Davis* case, *supra*, involved the far more carefully defined and restricted issue of jurisdiction. That decision quotes the *Longshoremen's Act* statutory presumption that as to any claim made thereunder it is to be "presumed, in the absence of *substantial* evidence to the contrary" (33 U.S.C. 920; italics added), that such claim comes within the Act, and, significantly, omits the qualifying "substantial" as it continues (317 U.S. 249, 256-7):

> "Findings of fact of the agency [U. S. Compensation Commission through its deputy commissioners], where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in case of apparent error."

The Supreme Court cases cited by appellants in this connection deal with statutory provisions not to

be found in the Longshoremen's Act and with an entirely different kind of law.[7] "Supported by evidence" is substantial enough in its own right. This statute "aims at 'sure and certain relief for workmen'" (the *Davis* case, *supra*, 317 U.S. at p. 254), and the language of each statute "'must be read in the light of the mischief to be corrected and the end to be attained'." *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940).

The deputy commissioner had to consider the credibility of the witnesses and had to weigh conflicting evidence, part of it relating to the fact of the injury and the chain of events which followed, the other part of it relating to the medical testimony. The rule has been repeatedly stated by the Supreme Court that in judicial review of cases arising under the Long-

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[7] The rights, remedies and procedure under the Longshoremen's Act are governed exclusively by that statute. *Associated Indemnity Corp. v. Marshall, deputy commissioner*, 71 F. (2d) 235 (C.C.A. 9, 1934); *Shugard v. Hoage, deputy commissioner*, 89 F. (2d) 796 (App. D.C., 1937); *Luyk v. Hertel*, 242 Mich. 445, 219 N.W. 721 (1928); *Texas Indemnity Ins. Co. v. Pemberton*, 9 S.W. (2d) 65 (Tex. 1928); *Nierman v. Industrial Comm.*, 329 Ill. 623, 161 N. E. 115 (1928); *Town of Albion v. Industrial Commission*, 202 Wis. 15, 231 N.W. 249 (1930). Compare *Bassett, deputy commissioner v. Massman Construction Company*, 120 F. (2d) 230 (C.C.A. 8, 1941), cert. den. 314 U. S. 648.

shoremen's Act, the courts will not reweigh the evidence to determine where the preponderance thereof lies.[8] In weighing this evidence the deputy commissioner had to apply the presumptions above mentioned.

B. The Findings of Fact Are Fully Supported by Evidence

The following is a reference to testimony taken at the hearings before the deputy commissioner sufficient to show that the complained of findings of fact of the deputy commissioner are supported by evidence.

John B. Piatt, claimant, testified as follows: That he was employed by Contractors, PNAB, on December 1, 1942, as Procurement Agent for the Naval Construction Battalion (R. 17); that on that day, while seated at his desk, a reflector shade from the

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[8] Even if the evidence permits conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be reweighed: *South Chicago Coal & Dock Co. v. Bassett, deputy commissioner*, 309 U.S. 251 (1940); *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U.S. 244 (1941); *Liberty Mutual Insurance Co. v. Gray, deputy commissioner*, 137 F. (2d) 926 (C.C.A. 9, 1943); *Lowe, deputy commissioner, v. Central R.R. Co.*, 113 F. (2d) 413 (C.C.A. 3, 1940); *Henderson, deputy commissioner v. Pate Stevedoring Co., Inc.*, 134 F. (2d) 440 (C.C.A. 5, 1943).

lamp above him fell and hit him on the head; that he stopped work and was helped to the first aid station by two of his assistants where they had him lie down, placing an ice-pack on his back and on his head, and they gave him some medicine; that he was then taken by car to Dr. Stewart of the Medical Center; that he had received a cut on the upper forehead and his scalp, which Dr. Stewart treated and painted; that he was told to go home and to keep quiet for 24 hours, which he did (R. 19, 20); that on the morning of December 3, he was picked up by automobile at his home and was taken to his office for an important conference; that he became dizzy at the meeting, felt very ill, and finally stated that he could stand it no longer, that he was going to get checked over by someone who knew something about head injury, and that he was going to see Dr. Cloward to find out what was the matter with him (R. 21); that he went to Dr. Cloward's office but the latter was not in; that the nurse told him to go home and she would have the doctor call; that he went home immediately and then Dr. Cloward ordered him to go directly to the hospital; that he was admitted to the hospital on December 3, and remained there until December 24, during all of which time he was a bed patient (R. 22, 23); that during January 1943, after he had been home from the hos-

pital about a week, he was taken in an automobile to see Dr. Cloward for a checkup; that from January 12, 1943, to February 27, (sic) 1943, he performed duties in an advisory capacity but became tired very quickly while working and could not remain at work more than about three hours a day; that he was under medical observation during the entire period and was being examined by Dr. Cloward once or twice a week; that Dr. Cloward said that he might go to the office as long as he did not overdo it.

Piatt further testified that he was born in 1888 (R. 24, 25); that he had been employed by Contractors, PNAB, since December 1939; that he had no lengthy periods of disability resulting from any disease except in 1937, when he had pneumonia for about 6 weeks (R. 26); (a report of examination made in 1935 from his own physician and received in evidence by agreement showed claimant's blood pressure to be 118/80) (R. 31); that he had had a physical examination for life insurance in 1929; that a $20,000 health policy was issued to him at that time (R. 32); that Dr. Cloward had an electrocardiograph and report on the heart, made by Dr. Gotshalk, when Dr. Cloward treated Piatt following the injury of December 1, 1942; that this was during the time Piatt was away from work and Dr. Cloward made a check-

up, saying: "You are o.k." (R. 33, 34); that on Piatt's discharge from the hospital he had headaches and the sensation of a tight band across the top and in the rear of the head, and felt weak (R. 35); that after the accident he was dizzy, but felt all right while he was lying down, becoming dizzy when he raised his head; *that during the first week after he left the hospital he had a continuous headache and recurrently thereafter every day up to the day of his collapse on February 26* (R. 36, 37); that on February 26, he arose and went into the bathroom to get ready to go to work, and while standing at the wash basin, he had to seize the basin to support himself; that he felt his knees sag and could not stand up; that he tried to call his wife, but could not speak and slumped to the floor where she found him; that on his admission to the hospital on the same day, the nurse took his blood pressure, looked at it "quick, sort of excited", then took it a second time and a third time; that his recollection is that his blood pressure was 240 (R. 38).

Mrs. Freda F. Piatt, claimant's wife, testified as follows: That on December 1, 1942, her husband came home around 11 o'clock and said he had been hit on the head; that he had never been ill, except with pneumonia (R. 41); that after his injury, as soon as he tried to work, after two or three hours at work he

would get very tired and his employers provided a driver and car for him; that he went to bed as soon as he got home and stayed there; that he wondered what was the matter with his head; that on February 26, 1943, about 6:20 in the morning, she called to him asking him if he was ready, but he made no reply, so she went to see and found him on the floor; that he appeared to have a stroke and could not move his left leg; that she got blankets and a pillow for him and she called Dr. Cloward who directed that her husband go to the hospital in an ambulance.

Mrs. Piatt further testified that it was about 54 hours from the time of the accident to her husband until Dr. Cloward sent her husband to the hospital to stay in bed, whereas during the intervening period her husband had been up and around (R. 42 to 44); that when, on or about December 12 she called at the hospital to see her husband, she inquired as to the possibility of his being returned home and Dr. Cloward advised that her husband could probably go home about the fourteenth day, but when her husband sat up his temperature went to 101 and he was ordered back to bed and kept there until December 26 (R. 68, 69); that the reason given by Dr. Cloward, the attending physician, was that the blood clot evidently was not eradicated or dissolved (R. 70); that

she was told by Dr. Cloward that her husband could not come home until the blood clot was dissolved (R. 71).

George L. Youmans testified as follows: That he is a member of the operating committee of Contractors, PNAB; that claimant, Piatt, worked under Youmans' supervision; that on the day that claimant came to attend the conference after his injury, he told the witness that he could not remain any longer, but had to return home (R. 45, 47); that when claimant returned to work after his first hospitalization he told the witness that he thought he could report for work perhaps three or four hours a day, to help out as he could, but would have to return home after such period; that he did so until the latter part of February when he had a further attack; that the witness considered the claimant an ill man who was getting up and attempting to help out to keep the program running although the witness knew that claimant was under physical and mental stress as the result of his injury (R. 48, 49).

Commander Howard P. Potter testified as follows: That he is a Commander, Civil Engineers' Corps, United States Naval Reserve, and was stationed at Hawaii in December 1942; that his work brought him in frequent contact with the claimant,

Piatt; that Piatt's duties required him to be vigorous and healthy (R. 49, 50); that before the accident of December 1, 1942, he appeared to have limitless energy; that at the conference which he attended shortly after his injury he exhibited signs of fatigue, tiredness, and mental anxiety; that the conference adjourned earlier than was intended because he was in distress; that there was marked change in his mental alertness; that he put his hand to his head frequently as if it were hurting him (R. 51, 52); that after the injury there was a difference in his ability to grasp situations and in his ability to remember details (R. 53-55).

Arden Walter Morgan testified as follows: That he was employed by Contractors, PNAB, and was claimant's principal assistant (R. 56); that the witness was called into the office on the morning of the accident and saw the light globe scattered about the floor, and noted that the claimant was quite dazed; that the height of the ceiling from which the globe fell was approximately ten feet and the globe was within two or three inches of the ceiling (R. 57); that the globe weighed three or four pounds (R. 58); that the witness helped take claimant across the street to the first aid station; that there was a cut on claimant's head which was bleeding and he appeared dazed and

reeled several times, staggering very much while crossing the street (R. 60, 61); that the witness had never worked with a man who had showed more energy than claimant prior to his injury (R. 62); that after the injury he was not the same as he had been before; that he was not as sharp in his work and tired very easily (R. 63); that he complained of continual headaches; that his associates avoided concerning the claimant with details after the injury (R. 64).

Dr. Ralph B. Cloward testified in part as follows: That *his first examination of claimant* after the injury was on December 3, 1942, *two days after the accident;* that it disclosed that claimant was in an extremely nervous state, was trembling and perspiring profusely, and that his voice quivered; that the claimant gave the history of having been struck on the head by a large chandelier while sitting at a desk; that the most striking thing about the examination was the extremely high blood pressure; that the witness made a tentative diagnosis of concussion of brain (R. 98, 99).

Dr. Cloward further testified that he could not say positively one way or another that the injury to claimant's head caused his paralysis (R. 110); that the witness did not think any neurologist could say

positively that an injury to the head might not in some way be related to subsequent changes that went on in the brain (R. 115); that he did not know whether or not a person could say that the plugging up of the artery in the brain was due to the blow on the head three months before (R. 115), but that in his opinion there would be no relation between the two (R. 117); that paralysis can come on quickly or slowly and progressively (R.111).

In forming his opinion that there was no causal relationship between the blow on the head and the subsequent paralysis, Dr. Cloward *assumed as a fact that claimant was "perfectly well" in the intervening period between his two periods of hospitalization and that the paralysis developed "out of a clear sky"* (R. 112). He also accepted as a fact that claimant "didn't complain of headaches, appreciable dizzy spells, or things of that sort" (R. 114) and he referred to claimant's injury as a "scratch on the head" (R. 107). However, the hospital records (Employer's and Carrier's Exhibit A, Part I) show that during the period December 3 to 24 when claimant was first in the hospital, he had headaches on December 3, 4, 6, 7, 10, 11, 18, 19, 20, 21 and 23. After his discharge from the hospital on December 24, 1942, and up to the time of his paralysis, February 26, 1943, the evi-

dence shows a history of continual headaches, weakness and dizziness (R. 24, 35, 36, 37, 42, 47, 49, 51, 52, 54, 63, 64).

Dr. Brown and Dr. Falconer examined claimant upon his return to the United States at the request of the employer and insurance carrier. They stated that in their opinion there was no causal relation between the injury of December 1, 1942, and the cerebral thrombosis of February 26, 1943. But both opinions were based upon several matters of misinformation: for example, Dr. Brown stated that claimant's blood pressure, upon admission to the hospital two days after his first injury, was 240/110, whereas it was 230/140 (see Carrier's Exhibit A, Part I, "Temperature, Pulse and Respiration Chart"); Dr. Brown's opinion is further based upon the erroneous impression that claimant, upon his return to work "was feeling fairly well," whereas the testimony of claimant, his wife and his associates discloses just the opposite situation. This phyician's opinion was also based upon the inaccurate understanding that claimant's blood pressure upon admission to the hospital the second time was 200, whereas the hospital records (Carrier's Exhibit A, Part II, "Neurological Examination on Admission") shows that the blood pressure was only 170/110.

Dr. Falconer's opinion was also based upon misinformation: he stated that claimant's blood pressure during his *first period* of hospitalization was 170 to 190, whereas the hospital records (Carrier's Exhibit A, Part I) show that it ranged from 230 on December 3, to 140 on December 17; also, he states that claimant's blood pressure on admission to the hospital on February 26 was 200 whereas the hospital records (Employer's Exhibit A, Part II) show that his blood pressure was 170/110 on February 26th. An additional error in Dr. Falconer's assumptions is that he states the claimant was discharged from the hospital on March 27, 1943, whereas he was discharged on May 5, 1943.

It is believed that the evidence above narrated discloses unmistakenly a situation of *continuing disability* from the time claimant received the blow to his head on December 1, 1942, until he became totally disabled on February 26, 1943. During that entire period claimant was either seeking to recuperate at home, was in the hospital, or was working only part of the day, — all such inactivity being plainly and directly the result of his injury. As the court below stated, it is difficult to see how anyone reading the record could come to any conclusion as to the cause

of claimant's disability other than the one to which the deputy commissioner came.

C. Medical Testimony Was Not Necessary

The decided cases show medical testimony is not necessary to establish causal connection. When an accident results in immediate injury and disability, such as head injury, and there then ensues a series of related complaints, such as headaches and dizziness of a substantially continuous nature, persisting until the employee is obliged to stop work, the causal connection between the injury and the disability which follows does not have to be established exclusively by testimony of professional witnesses; it may equally be established by *other competent evidence, circumstantial and direct.* In addition — where a workman in apparent good health sustains an injury which produces immediate symptoms and disability, illness or pain, with related symptoms which continue thereafter, there arises a *presumption* that the subsequent disability (where it is of a nature consistent with that which may result from such an injury) did in fact result therefrom. *Wroten v. Woodley Petroleum Co.*, 12 La. App. 348, 124 So. 542 (1929); compare *Jarka Corporation v. Norton, deputy commissioner*, 56 F. (2d) 287 (E.D. Pa., 1930), where the court said:

" * * * I am unwilling to hold that a claimant, in order to establish a case for compensation, must produce expert medical testimony to substantiate his claim, where it is proved that he sustained a fracture of the back and is now unable to work, and where the disability, not having existed before the injury, has been more or less *continuous since the injury.* I am also unwilling to hold that the commissioner is bound to accept the opinion of a medical expert for a respondent merely because uncontradicted. It seems to me that to sustain his contention that the award is not in accordance with law would require the court to adopt either of the foregoing rules." (Italics supplied).[9]

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[9] As to the effect of *circumstances* outweighing and disposing of a *physician's expressed opinion*, the Supreme Court of Kansas in *Dinoni v. Vulcan Coal Co.*, 132 Kans. 810, 297 P. 721, said (from syllabus by the Court): "When all the facts and circumstances of an injury, its treatment, changes, and results, are before the compensation commissioner, and later before the district court, and also the opinion of a physician, *the latter can not be said to be the undisputed evidence in the case, if the facts and circumstances reasonably tend to show or indicate a different conclusion from that expressed in his opinion.*" (Italics supplied).

To the same effect is *Utah Delaware Min. Co. v. Ind. Commission*, 76 Utah 187, 289 P. 94, (1930), wherein the court said: "Notwithstanding the opinion expressed by the attending physician — it was but an opinion — that he saw no connection between the present disabilities of the applicant and the injuries sustained by him at the time of the accident, nevertheless the commission had before it sufficient evidence to justify a finding that the disabilities were attribu-

While there was medical opinion to the effect that the disability directly attributable to cerebral thrombosis was not caused by the accident, the opinion was not based upon the correct factual situation in the case, as shown in the record. Moreover, the deputy commissioner is not bound to accept the opinion or theory of any particular medical examiner. He may rely upon his own observation and judgment in conjunction with the evidence: *Contractors, PNAB, v.*

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table to the accident. The nature and extent of the injuries occasioned by the accident and the parts of the body injured and affected, and the physical condition of the applicant thereafter from the time of the accident until the hearing, were all fully described and laid before the commission. Whether the present disabilities were or were not attributable to the injuries received at the time of the accident, constituted the ultimate fact or question to be determined by the commission. They were not bound to accept a mere opinion of an expert on such an ultimate question, unless such was the only reasonable conclusion to reach in the premises. * * * The applicant, prior to the accident, having been healthy and able-bodied and having no prior kidney or bladder trouble and no sickness of any kind, and receiving a rather severe injury in the region of the kidney, together with evidence that he thereafter almost continually suffered and complained of pain in that region, and not anything to show that the diseased and infectious conditions were attributable to another cause, the natural cause to which they may be attributable is the injury received at the time of the accident. We thus think the evidence sufficient to support the findings in such respect."

Pillsbury, deputy commissioner, ... F. (2d) .... (C.C.A. *9*, No. 10,950, June 22, 1945).[10] In *Southern Steamship Co. v. Norton, deputy commissioner*, 41 F. Supp. 108 (E.D. Pa. 1941) Aff'd. 128 F. (2d) 263 (C.C.A. 3, 1942), the court said:

> "The medical testimony was no stronger in the Di Giorgio case than in the case at bar. There, as here, no physician positively established a causal relation between the accident and the injury; *nor was there any medical testimony even that the accident probably caused the injury.* One physician said it was a doubtful case: the physicians in general could not conclude definitely that the accident was the cause of the cataractous condition. Obviously, the Deputy Commissioner in the Di Giorgio case reached his conclusions that the injury and the cataractous condition did result from the accident from other and nonmedical testimony in the case.

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[10] See also *Liberty Stevedoring Co., Inc. v. Cardillo, deputy commissioner*, 18 F. Supp. 729 (E.D. N.Y., 1937); *Joyce v. United States Deputy Commissioner*, 33 F. (2d) 218 (D.C. Me., 1929); *Jarka Corporation v. Norton, deputy commissioner*, 56 F. (2d) 287 (E.D. Pa., 1930); *E. S. Booth v. Monahan, deputy commissioner*, 56 F. (2d) 168 (D.C. Me., 1930); *Zurich General Accident & Liability Insurance Co. v. Marshall, deputy commissioner*, 42 F. (2d) 1010 (D.C. Wash. 1930); *Baltimore & Ohio R.R. Co. v. Clark, deputy commissioner*, 56 F. (2d) 212 (D.C. Md., 1932); *Ryan Stevedoring Co., Inc. v. Norton, deputy commissioner*, 50 F. Supp. 221 (E.D. Pa. 1943); *Liberty Mutual Ins. Co. v. Marshall, deputy commissioner*, 57 F. Supp. 177 (W.D. Wash. N.D. 1944).

> "I reach the same conclusions in the instant case, to wit, that the absence of medical testimony definitely or positively establishing a causal relation between the accident and the loss of vision does not rob the findings and award of the Deputy Commissioner of validity, provided there is any other testimony to support them. That other testimony is furnished by the employee himself, including the testimony that his vision, good before the accident, was impaired thereafter." (Italics supplied).[11]

In *Frank Marra Co., Inc. v. Norton, deputy commissioner*, 56 F. (2d) 246 (E.D. Pa., 1931), the court said:

> "The further proposition which bears the brunt of the argument is to the effect that the cause of a death is within the peculiar province of expert opinion and that a finding must have as one of its supports the testimony of an expert. It is urged that the finding of the cause of death in this case is without such support, inasmuch as the expert testimony was not that the death was due to injuries received in the course of employment, but merely that it might have been so due. In this view, the death may have resulted from any one or two or more causes, one of which was traumatic. If the testimony of the experts were all the evidence in support of the fact finding made, it is clear that it would give equal support

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[11] *In McNeelly v. Sheppeard, deputy commissioner*, 89 F. (2d) 956 (C.C.A. 5, 1937), which also involved the question of causal relationship between an alleged injury and subsequent death, the court said: "The physician's opinion, while admissible, was not conclusive."

to any one of several different findings. There was, however, other evidence. An acceptance of the argument addressed to us would closely approach the proposition that no finding of a cause of death can be made which does not have the support of expert opinion. This latter proposition we cannot accept. Whenever opinion evidence is admissible, the opinion of an expert is evidence, but it is in itself nothing more. It may be convincing or unconvincing. It may in itself be all sufficient to support a finding, but it does not follow that a finding may not be made without it. To hold otherwise would be to rule in effect that it is not for the fact finding tribunal, but for the experts, to find the cause of death."

In the case of *Ryan Stevedoring Co. v. Norton, deputy commissioner*, 50 F. Supp. 221 (E.D. Pa., 1943), which arose under the Longshoremen's Act, the court said:

"While it is true that the sole medical testimony in the case shows no causal connection between the accident and the disability for which the challenged award of compensation was made, it has been held that such causal connection need not be established by medical testimony, but that the Deputy Commissioner may rely upon his own observation and judgment in conjunction with the evidence. *Southern Steamship Co. v. Norton*, 41 F. Supp. 108, affirmed 128 F. (2d) 263, C.C.A. 3; *Frank Marra Co. v. Norton*, 56 F. (2d) 246. It has further been held that the Deputy Commissioner is not bound by the uncontradicted testimony of medical witnesses where other evidence warrants a different conclusion. *Wood Preserving Corp. v. McManigal*,

39 F. Supp. 177; *Jarka Corp. of Philadelphia v. Norton* 56 F. (2d) 267."[12]

The decisions under the Longshoremen's Act are consistent with the decisions under the various state compensation laws. Thus in *Liberty Mutual Insurance Company v. Williams*, 44 Ga. App. 452, 161 S. E. 853 (1932), the employee sustained an injury to his leg and side on February 20, 1930. On April 8, the attending physician dismissed the employee as being able to return to work, but he was still unable to get about, except by the use of crutches and from then on his condition grew worse so that he was soon confined to bed and continued in a state of illness until his death on May 3, 1930, from a cerebral hemorrhage caused by high blood pressure. The two physician witnesses for the employer testified that there was no causal relationship between the employee's injury and the high blood pressure

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[12] See also *Associated General Contractors v. Cardillo, deputy commissioner*, 106 F. (2d) 327 (App. D.C., 1939), where an award for death from a cerebral hemorrhage which occured a month and a half after the alleged injury was sustained upon medical evidence that the injury could have occured in the manner described and could have caused the condition disclosed by the medical examination. Cf. *Independent Pier Co. v. Norton, deputy commissioner*, 54 F. (2d) 734 (C.C.A. 3, 1931).

and cerebral hemorrhage. The court, in sustaining an award of compensation, stated:

> "The testimony of the physicians as to want of any causal association between the employee's injuries and the cerebral hemorrhage and high blood pressure from which he died was not binding upon the Industrial Commission but the question as to the weight and credit to be given to such testimony was a matter to be determined by the Commission."

In *Kempa v. Pittsburgh Terminal Coal Corporation*, 133 Pa. Super. 392, 3 A. (2d) 34 (1938), the employee, a miner for 30 years, aged 61 years, was injured on March 2, 1936, when he was struck on the head and shoulders by loose coal which fell from the roof rendering him unconscious for a short time, estimated at from two to five minutes. He was taken to the mine doctor who ordered him to return home and go to bed. The next day the doctor directed that ice be put on his head. He returned to work on March 6, 1936, and continued until Labor Day (first Monday in September), when he was compelled to quit due to failing health. The referee made an award of compensation, finding as follows:

> "From a consideration of all the testimony in the case, particularly the fact that claimant suffered a concussion of the brain at the time of

the accident, and the continued complaints of headaches and dizziness thereafter, your Referee is of the opinion and finds as a fact that said claimant is suffering with total disability and that said disability is the result of the injury sustained by him on March 2, 1936."

The court in affirming the compensation award, said:

"There is no doubt that claimant had been steadily employed as a miner until the accident, that there was an accidental injury, and that immediately and directly thereafter total disability, for at least a time, followed.

"Testimony offered upon the part of the claimant was to the effect that after the accident he apparently did not readily comprehend what was said to him, that he was unable to sleep, suffered from severe headaches, dizziness, had trouble with his eyes, and became irritable.

* * * * *

"The connection between the injury, which resulted from a fall of coal that buried claimant to his waist, and the disability which followed was not remote but so direct and natural that an award does not depend solely on the testimony of the professional witnesses; essential facts to support it were established by other competent evidence. (citing cases)

"Taking into consideration all the testimony offered by claimant, we have no difficulty in reaching the conclusion that the granting of the award was fully justified * * * the fact-finding body has a right to use the conclusions and tests of ordinary everyday experience and draw the inferences which reasonable men would thus draw from similar facts."

In *Southern Cement Co. v. Walthall*, 217 Ala. 645, 117 So. 17 (1928), the employee was injured on June 14, 1926, by a blow on the head from a falling beam of timber. He laid off work for several days, went back to work for two days, then quit work entirely and about August 21, 1926, suffered a stroke of apoplexy with paralysis of the left side, from which he died August 31, 1926. An award of compensation was made from which the employer appealed, contending that the death was not causally related to the injury. The court, in affirming the award, said:

> "While the testimony of the two physicians examined on behalf of defendant tends strongly to the conclusion that the deceased workman's death was due to a long-standing and far-advanced condition of arteriosclerosis, which culminated naturally and inevitably in a fatal cerebral hemorrhage, yet there was other testimony which, we think, supports the trial court's finding that the blow or blows on the workman's head proximately caused the fatal hemorrhage about two months afterwards."

Cf. *M. P. Moller Motor Car Co. v. Unger*, 166 Md. 198, 170 A. 777 (1934); *Pierron v. Prudential Insurance Company*, 65 Ohio App. 465, 30 N. E. (2d) 563 (1941).

Appellants, in substance, simply urge that there

is no evidence to support the deputy commissioner's finding that the accident was the "direct and proximate cause" of the cerebral thrombosis. Without delving into the subject of "proximate cause", it is respectfully submitted that (1) an injury which either causes, or concurs with a disease to cause, disability is the proximate cause of the disability;[13] (2) the concept of proximate cause, as it is applied in tort law, is not applicable in the administration of workmen's compensation laws;[14] and (3) the deputy commissioner did not find that the injury was the cause,

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[13] See *Victor Oolotic Stone Co. v. Crider*, 106 Ind. App. 461, 19 N. E. (2d) 478 (1939), where an employee injured by a blow on the head on December 7, 1937 died from meningitis on February 8, 1938; *Texas Indemnity Co. v. Staggs*, 134 Tex. 318, 134 S. W. (2d) 1026 (1940). Where it is intended that the injury, to be compensable, must be the *sole* cause of the disability, it is the rule to so provide in the law. For example, see sec. 301 (c) of the Pennsylvania workmen's compensation statute, which provides in substance that silicosis shall not be considered compensable unless it is the *sole* cause of the disability.

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[14] *Manitowoc Boiler Works v. Industrial Commission*, 165 Wis. 592, 163 N. W. 172, 106 A.L.R. 82 (1917); *Hartford Accident and Indemnity Co. v. Cardillo, deputy commissioner*, 112 F. (2d) 11, 17 (App. D.C. 1940). Cf. Morris, *On the Teaching of Legal Cause* (1939), 39 Col. L. Rev. 1087; *Avignone Freres, Inc. v. Cardillo, deputy commissioner*, 117 F.

proximate or otherwise, of the cerebral thrombosis, or as appellants contend, that the cerebral thrombosis resulted from the injury and was the sole cause of claimant's disability; the deputy commissioner merely found that claimant was disabled as the result of the injury, a finding fully supported by the evidence in its natural and common sense interpretation.

(2d) 385 (App. D.C. 1940); *Texas Indemnity Co. v. Staggs*, 134 Tex. 318, 134 S. W. (2d) 1026 (1940). In *Travelers Insurance Company v. Peters* 14 S. W. (2d) 1007 (Tex. 1929), the court said: "*We are of the opinion that the rule of proximate cause has no application to cases arising under the Workmen's Compensation Act.* The term 'proximate cause' is not used anywhere in the act. A party claiming compensation under such act cannot be compelled to go further than is required by the provisions of the act, either in pleading or proving his cause of action. It is true that there must be established a causal connection between an injury and the death of an employee before a recovery would be authorized. If, however, the injury is shown to be the producing cause of the death, a finding is justified that death was due to the injury, if it arises in the course of and out of the employment. It need not be established that the death was a proximate result of the injury. Snyder's [Schneider] Workmen's Compensation Laws, vol. 2, sec. 523; *Lundy v. George Brown Co.*, 93 N.J. Law, 107, 106 A. 362; *Tanner v. Aluminum Castings Co.*, 210 Mich. 366, 178, N.W. 69; *Krueger v. Hayes Mfg. Co.*, 213 Mich. 218, 181 N.W. 1010; *King v. Buckeye Cotton Oil Co.*, 155 Tenn. 491, 296 S.W. 3, 53 A.L.R. 1086; *Bramble v. Shields*, 146 Md. 494, 127 A. 44; *Anderson v. Industrial Ins. Co.*, 116 Wash. 421, 199 P. 747." (Italics supplied)

Assuming, *arguendo*, that the cerebral thrombosis did not result from the injury but merely added to the disability, the employer and insurance carrier would not be relieved of their liability for the disability existing on February 26, 1943. Where intervening disease or injury which would itself cause disability is superimposed upon the compensable disability then existing, liability for disability from the first cause continues. *Bernatowicz v. Nacirema Operating Co.*, 142 F. (2d) 385 (C.C.A. 3, 1944). In the case just cited, the court quoted from *Bay Ridge Operating Co. v. Lowe, deputy commissioner*, 14 F. Supp. 280 (S.D. N.Y.) stating:

> " 'The act does not say that although the disability continues, payments are to cease *in the event that the employee later also becomes incapacitated from another cause.* If the plaintiff's contention is right, it must be because such a limitation is to be read into the statute and to do this would be contrary to the general policy in dealing with this statute and which should be liberally construed. *Rothschild & Co. v. Marshall* [9 Cir.], 44 F. (2d) 546; *De Wald v. Baltimore & O. R. Co.*, [4 Cir.], 71 F. (2d) 810.
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> " 'It could not reasonably be contended that if an employee receiving payment for a permanent total or permanent partial disability met with another accident or from some other cause suffered another permanent disability, that the employer could then stop his payment.' " (Italics supplied)

Cf. *Whitehead's Case*, 312 Mass. 611, 45 N. E. (2d) 839 (1943).

It is respectfully submitted that if the Deputy Commissioner had found that claimant's disability resulting from the injury of December 1, 1942, had terminated prior to February 26, 1943, the date of the paralysis, the finding would have been contrary to the uncontradicted evidence of claimant, his wife and all his business associates.[15] As to the period subsequent to February 26, 1943, there is no evidence that the disability resulting from the injury had terminated. All that the physicians testified to — and that upon incorrect factual bases — was that in their opinion the injury of December 1, 1942, did not cause the cerebral thrombosis. They did not state that

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[15] The evidence is uncontradicted that claimant was disabled or continually ill from the time of his injury on December 1, 1942, to the date of his paralysis on February 26, 1943. Disability is defined in the Longshoremen's Act (33 U.S.C. 902 (10)) as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment". Although presumably claimant received his pay during the period in which he worked part time, he was disabled within the meaning of the Act. The fact that the employee receives his regular wages after the injury does not mean that he is not disabled. *Twin Harbor Stevedoring & Tug Company v. Marshall,*

claimant was not disabled from the original cause. Thus the gap in their testimony is apparent.

II

APPELLANTS' AUTHORITIES ARE INAPPLICABLE TO THE CASE AT BAR

Appellants rely principally upon the state court cases of *Burton v. Holden & M. Lumber Co.*, 112 Vt. 17, 20 A. (2d) 99 (1941), and *Pacific Employers Ins. Co. v. Industrial Accident Comm.*, 118 P. (2d) 334 (Cal. 1941), as establishing the necessity of medical opinion. Whatever weight these cases may have on the proposition for which cited, there are numerous authorities to the contrary, and furthermore, such cases are distinguishable from the case at bar

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deputy commissioner, 103 F. (2d) 513 (C.C.A. 9, 1939); *Hartford Accident and Indemnity Co. v. Hoage, deputy commissioner*, 85 F. (2d) 420 App. D.C., (1936); *Luckenbach Steamship Co. v. Norton, deputy commissioner*, 96 F. (2d) 764 (C.C.A. 3, 1938); *Roller v. Warren*, 98 Vt. 514, 129 Atl. 168 (1925); *Postal Telegraph-Cable Co. v. Industrial Accident Commission*, 213 Cal. 544, 3 P. (2d) 6 (1931); *Burley Welding Works, Inc. v. Lawson, deputy commissioner*, 141 F. (2d) 964 (C.C.A. 5, 1944). An employee might be paid and receive his full wages although he is able to perform none or only a few of his duties. The concept of payment and receipt of wages and the concept of incapacity and disability to earn wages are not mutually exclusive.

and without application to the facts at hand. The *Burton* case involved the question of causal relation between a *sliver* which the employee got in his *finger* and a cerebral thrombosis. Such a situation is one of those "not apparent" type of cases where no common sense connection can be perceived. In the present case the employee was struck and seriously wounded on the *head*, the same place where his subsequent trouble developed after the continuance of persistent headaches and dizziness in the interval between the accident and the climax, — circumstances entitled to the greatest weight in the appraisal of the evidence. In the *Pacific Employers* case, the question involved was whether an ulcer from which the employee suffered was due to an injury. *The employee there had admitted that she was bothered with ulcers since childhood.* In the present case there was no evidence that the employee had any previous concussion or cerebral thrombosis. On the contrary, the evidence discloses that up to the time of the accident he was a man in excellent condition, robust and energetic physically and mentally.

CONCLUSION

It is respectfully submitted that the order of the Court below dismissing the petition to set aside the deputy commissioner's award was proper and should be affirmed.

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